ASARCO, INC.

IBLA 83-14, 83-305, 83-400 Decided April 14, 1983

Appeal from delayed granting of extension to hardrock mineral prospecting permits, ES 16043, ES 16044, ES 16076, ES 16077, ES 16078, ES 17837, ES 17838, ES 17839, and ES 17840, by the Eastern States Office, Bureau of Land Management.

Set aside and remanded.

1. Mineral Lands: Prospecting Permits

> Where, pursuant to 43 CFR Part 3510, BLM grants 2-year extensions to hardrock mineral prospecting permits on certain acquired lands within a national forest, but delays approval of the extensions until from 9 to 19 months have elapsed after the expiration of the original permits, and then dates the extensions from the terminal date of the original permits, the permits will be deemed to have been suspended during the period between the expiration date of the original permits and the granting of the extensions, so that the permittee may have a full 2-year term for prospecting.

APPEARANCES: Jerry L. Haggard, Esq., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Effective June 1, 1979, the Eastern States Office, Bureau of Land Management (BLM), issued hardrock mineral prospecting permits ES 16043, ES 16044, ES 16076, ES 16077, ES 16078, ES 17837, ES 17838, and ES 17839, to ASARCO, Inc. BLM also issued hardrock mineral prospecting permit ES 17840 to ASARCO, effective November 1, 1979. 1/ The lands involved are acquired lands within

1/ The relevant information concerning the prospecting permits is:

Permit No.	Extension Date	Term Extended Request	Init. Expiration Date Granted	Extension To
ES 16043	5/31/81	5/15/81	12/21/82	5/31/83
ES 16044	5/31/81	5/8/81	12/21/82	5/31/83

the Mark Twain National Forest, Missouri. The permits were for a 2-year period, with the right to an extension of 2 years if certain conditions were met. ASARCO timely filed applications for extensions of the permits. By decisions of December 21, 1982, BLM extended permits ES 16043, ES 16044, ES 16076, ES 16077, ES 16078, and ES 17839 to May 31, 1983, 2 years from the expiration date of the original permits, and by decisions of January 26, 1983, BLM extended permits ES 17837 and ES 17838 to May 31, 1983, likewise 2 years from the expiration date of the original permits. Permit ES 17840 was extended to October 31, 1983, 2 years from the expiration date by decision of August 17, 1982.

ASARCO has appealed, arguing that its prospecting operations were necessarily shut down from the expiration of the original permits until advised that the extensions had been granted, so the actual extensions amount to less than 6 months for six of the permits, 4 months for two, and less than 14 months for one, rather than the 2 years contemplated by the regulations in 43 CFR 3511.3. ASARCO states that it has paid annual rental from the expiration date of the permits and it thus is penalized financially by the abbreviated extensions.

ASARCO has requested consolidation of these appeals. We accede to that request.

In ASARCO, Inc., 70 IBLA 91 (1983), this Board ruled that an extension of a prospecting permit is a prolongation of the term of the previous interest, and so commences as of the expiration date of the primary term of the permit. We adhere to that position.

[1] In an analogous case, Leroy Pedersen, 56 IBLA 86, 88 I.D. 646 (1981), this Board held that where, pursuant to 43 CFR Part 3510, BLM grants a 2-year permit for hardrock prospecting on acquired lands in a national forest with the concurrence of the Forest Service and the Geological Survey, and thereafter fails to approve the permittee's operating plan during the term of the permit and a 2-year extension, the permit will be considered to have been suspended during that period. So, in this case, where there was an inordinate delay by BLM in granting the extension to the permits following receipt of the applications, we direct BLM to consider permits ES 16043, ES 16044, ES 16076, ES 16077, ES 16078, and ES 17839 as suspended from June 1, 1981, until December 21, 1982, the date the extensions were finally granted, so that the permittee may conduct prospecting operations on the indicated lands until December 21, 1984, and to consider permits ES 17837 and ES 17838

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fn. 1 (continued)

ES 16076	5/31/81	5/8/81	12/21/82	5/31/83
ES 16077	5/31/81	5/8/81	12/21/82	5/31/83
ES 16078	5/31/81	5/8/81	12/21/82	5/31/83
ES 17837	5/31/81	5/15/81	1/26/83	5/31/83
ES 17838	5/31/81	5/8/81	1/26/83	5/31/83
ES 17839	5/31/81	5/8/81	1/26/83	5/31/83
ES 17840	10/31/81	10/7/81	8/17/82	10/31/83

ES 17840 was docketed with the Board as IBLA 83-14. ES 17837 and ES 17838 were docketed as IBLA 83-400. All the other prospecting permits fall under IBLA 83-305.

as suspended from June 1, 1981, until January 26, 1983, so that the permittee may conduct prospecting operations on the indicated lands until January 26, 1985. In addition, it should consider ES 17840 suspended from October 31, 1981, to August 17, 1982, the date the extension was finally granted, so the permittee may conduct prospecting operations on the land until August 17, 1984.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions are set aside and cases are remanded to the Eastern States Office, Bureau of Land Management, for further action consistent with this opinion.

Douglas E. Henriques

Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

I am in agreement that ASARCO is entitled to a full 2-year extension for each of the permits in question; however, in the face of that conclusion, I cannot agree to an adherence to our position in ASARCO, Inc., 70 IBLA 91 (1983). I would modify the decision in that case to allow a full 2-year extension also.

On appeal ASARCO states that it has sought extensions for each of its numerous prospecting permits, and that BLM has routinely granted extensions, although taking 3 to 18 months to do so. ASARCO indicates that while BLM had been granting full 2-year extensions, it "has recently taken the position that the extended two year period begins to run from the date the initial two year term ended" (Supplemental Statement of Reasons at 2). ASARCO asserts that the practical effect of this is that its permits are extended for much less than 2 years. It states that it received no notice from BLM concerning this change of practice after it had begun relying on the former practice.

ASARCO states that for two other prospecting permits, ES 16074 and ES 16173, the initial term was to expire on January 31, 1981; that extensions were requested in January 1981; that on May 28, 1981, BLM extended the permits to January 31, 1983; that ASARCO sought reconsideration of that action requesting an extension to May 27, 1983; and that on December 10, 1981, BLM issued a decision amending the extensions to make them effective to May 27, 1983 (Supplemental Statement of Reasons at 5, and Exhs. CC, EE, and FF attached thereto). ASARCO argues that BLM has now decided for these other permits that the extended term will run from the expiration date of the original term.

ASARCO points out that for the permits in question in these consolidated cases, the delay in approval has cost it to lose anywhere from 9.5 to 19.8 months of the 2-year extensions. ASARCO concludes that under BLM's present policy, even if it applied for an extension at the earliest legal date, i.e., 90 days prior to expiration (43 CFR 3511.3-2), administrative delay would cause it to receive less than a 2-year extension. ASARCO also states that the Minerals Management Service recommended full 2-year extensions, and that those recommendations were ignored by BLM. 1/

1/ In the case file for ES 17840 is a Feb. 2, 1982, memorandum from MMS to BLM. It states: "The permittee has fulfilled the permit requirements for an extension, therefore, it is recommended that a two year extension be granted. Because of administrative delay, the extension should be dated to allow two full years." (Emphasis added.) BLM did not adopt that recommendation. However, for permits ES 16074 and ES 16173, BLM stated in its Dec. 10, 1981, decision:

"The permittee timely filed applications for extensions of prospecting permits ES 16074 and 16173. U.S. Geological Survey has recommended that the decision dated May 28, 1981 granting extensions to the above prospecting permits be amended to allow for two full years because of administrative delay.

"Accordingly, the permits [sic] extensions are hereby amended and extended to May 27, 1983."

In support of its contention that it is entitled to full 2-year extensions, ASARCO cites Peterson v. Department of the Interior, 510 F. Supp. 777 (D. Utah 1981). In that case, coal prospecting permittees made timely applications for extensions under 43 CFR 3511.3-1. Geological Survey recommended that the extensions be granted, yet BLM took no action. Subsequently, the Federal Coal Leasing Amendments Act of 1976 (FCLAA) was passed, and BLM issued decisions rejecting the applications on the ground that the permittees did not have "valid existing rights" under that Act and that the Secretary's authority to grant extensions was terminated by section 4 of FCLAA, 30 U.S.C. § 201(b)(1) (1976). 510 F. Supp. at 780. This Board affirmed in Virgil V. Peterson, 37 IBLA 18 (1978). The district court reversed and ordered that the Secretary consider the extension applications with the extension term "to commence from the date of his decision." 510 F. Supp. at 784.

ASARCO quotes from the district court where it stated at 510 F. Supp. 783:

> It would be unfair to encourage private development of coal on federal lands, with the attendant expenditures, without giving the applicant a fair opportunity to capitalize on his investment. The previous agency practice of automatically granting an extension upon the applicant meeting the statutory and regulatory requirements and upon the recommendation of the Regional Mining Supervisor has the effect of encouraging reliance on the consistency with which such extensions were granted. Such reliance, coupled with the expenditure of substantial time and effort, created a valid existing right * * *.

ASARCO asserts that it has expended a great deal of time and money ($892,506) in developing its prospecting permits (Supplemental Statement of Reasons at 15).

ASARCO also directs our attention to Leroy Pedersen, 56 IBLA 86, 88 I.D. 646 (1981), and indicates that it should control the result in these cases. Pedersen also involved a hardrock prospecting permit. In that case BLM failed to approve the permittee's operating plan during the term of the permit and a 2-year extension. The Board ruled that the permit should be considered to have been suspended during that period and that "[i]n the interest of fairness, we hold that when all approvals are finalized, appellant shall be allowed to prospect for a 2-year period under permit CA 1698 with the rights to request a 2-year extension under the regulations if warranted at the end of the first term." 56 IBLA at 95, 88 I.D. at 651-52.

Herein, we have found the Pedersen case controlling and have ordered full 2-year extensions for all of the permits involved in these cases. With this, I agree. ASARCO should not be made to suffer for the administrative

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fn. 1 (continued)
There is no explanation in the records for any of the cases indicating BLM's rationale for accepting a recommendation in one case and not in another. In fact, the delay involved in granting the extensions in ES 16074 and ES 16173 was much less than the delay in any of the cases involved herein.

delay in approving its timely requests. However, I am unwilling to distinguish the present situation from that presented in ASARCO, Inc., supra. At the time of the issuance of ASARCO it seemed reasonable that where a permittee filed an extension request only a few days before the expiration of its permit (ES 17946) and BLM took approximately 3-1/2 months to approve the extension, the permittee should bear some of the responsibility for the delay. The rationale was that if the permittee had filed its application earlier, most of the delay could have been avoided. Thus, we held in that case that an extension of a permit is an elongation of the original permit, and it commences as of the expiration date of the primary term of the permit. As a matter of law I am in agreement with that proposition; however, in that ASARCO case, we did not have the benefit of the history of ASARCO's relationship with the BLM Eastern States Office concerning its prospecting permits.

I would apply the same rationale to our earlier ASARCO case that we have applied herein. In the interest of equity and fairness in my judgment we should direct BLM to consider ES 17946 to have been suspended from the end of its original term to the date of approval of the extension and grant ASARCO a full 2-year extension from that date.

The regulation governing the filing of an extension states only that an application for extension "must be filed in quintuplicate in the proper office within 90 days prior to expiration of the permit." 43 CFR 3511.3-2(a). The regulation does not require that the application be filed at least a certain number of days prior to expiration of a permit. Therefore, an application must be considered timely filed under the regulation if it is filed anytime within 90 days of the end of the original term.

The fact that ASARCO did not file an extension application until only a few days before the expiration of ES 17946 should not be held against it where the record now establishes that BLM had been granting full 2-year extensions. In fact, for ES 16074 and ES 16173 BLM reconsidered its decision which had granted ASARCO only 20-month extensions, and gave ASARCO full 2-year extensions citing administrative delay. See note 1, supra. The administrative delay in that situation was less than 5 months. For permit ES 17946 the processing time was 3-1/2 months. Given the course of conduct of the BLM Eastern States Office, I would direct BLM to consider ES 17946 to have been suspended from the end of its original term to the date of approval of the extension and grant a full 2-year extension for ES 17946. Therefore, I would grant the petition for reconsideration of ASARCO, Inc., supra, and although I would reaffirm our legal holding in that case, I would modify our result to allow ASARCO a full 2-year extension in that case also.

For the above stated reasons, I concur in the result in this case.

Bruce R. Harris
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While concurring fully in the lead opinion, I wish to express my strong belief that our prior decision in ASARCO, Inc., 70 IBLA 91 (1983), was correctly decided. Judge Harris, in his concurring opinion, discusses the reasons why he believes that decision was in error. I wish to address the points raised by Judge Harris.

Initially, however, I believe it essential to delineate exactly what we are holding herein. First of all, we are reaffirming the holding in ASARCO, Inc., supra, that, as a matter of law, an extension commences effective on midnight of the last day of the original permit. But, recognizing that the inordinate and unjustified delays which occurred in processing the extension requests would effectively vitiate the granted extensions, we are directing BLM to retroactively suspend the running of the 2 years for the period of time commencing at the end of the initial permit to the date of actual approval of the extension. This, indeed, is consistent with our holding in Leroy Pedersen, 56 IBLA 86, 88 I.D. 646 (1981). This action, however, is grounded in equity and fairness, not on a theory that such suspension is required by law.

Indeed, I do not see how such action could be required by the law since, even where a permittee has complied with the regulatory prerequisites for extension, BLM may, for good reason, refuse to grant any extension whatsoever and, indeed, if the Forest Service withholds its consent, is barred from granting the extension. See 43 CFR 3501.2-6(d). Moreover, the regulations clearly provide that a 2-year extension is the maximum period that may be granted. Thus, 43 CFR 3511.3-3 states: "Extension will be limited to such period, not to exceed the 2 years, as may be determined to be allowable under the circumstances in each particular case."

In this regard, I would point out that extension of hardrock prospecting permits is fundamentally different from extensions formerly granted for coal prospecting permits. 1/ The extension of coal prospecting permits was expressly authorized by the Act of March 9, 1928, 45 Stat. 251, and was codified as part of 30 U.S.C. § 201 (1970) by section 1 of the Act of June 3, 1948, 62 Stat. 289. That Act provided that "any coal prospecting permit * * * may be extended by the Secretary for a period of two years." 30 U.S.C. § 201(b) (1970). In interpreting the 1928 Act, early regulations actually provided that coal permits, even where no extension application had been filed, did not expire until the running of 4 years from the date of issuance. See, e.g., Carl Nyman, 59 I.D. 238 (1946). While this regulatory language

1/ The Federal Coal Leasing Amendments Act of 1976 (FCLAA), Act of Aug. 4, 1976, 90 Stat. 1083, greatly revised coal leasing procedures. Section 4(b)(1) deleted all references to coal prospecting permits, substituting therefor the term "exploration license," and expressly provided that "an exploration license shall confer no right to a lease under this chapter." Moreover, the regulations adopted pursuant thereto explicitly state that "exploration licenses shall not be extended." 43 CFR 3410.3-1(h).

was subsequently removed, 2/ there can be no question that even after deletion, approval of coal permit extensions for 2 full years was treated as a relatively pro forma matter. See, e.g., Peterson v. Department of the Interior, 510 F. Supp. 777, 781 (D. Utah 1981); Peabody Coal Co. v. Andrus, 477 F. Supp. 120, 121 (D. Wyo. 1979).

This must be contrasted with the situation surrounding hardrock leasing of lands acquired under the Weeks Act, Act of March 1, 1911, 36 Stat. 963, for watershed protection. The Act of March 4, 1917, 39 Stat. 1150, authorized the Secretary of Agriculture "under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands [acquired under the Weeks Act] upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States." Pursuant to section 402 of Reorganization Plan No. 3, 60 Stat. 1099, this function of the Secretary of Agriculture was transferred to the Secretary of the Interior, 3/ with the proviso that mineral development of such lands could be authorized only upon a finding by the Secretary of Agriculture "that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified."

Thus, the relevant statute did not expressly provide for either a specific term or for subsequent extensions of hardrock prospecting permits. The applicable regulations, in fact, originally provided for a permit of 20 years' duration and there was no provision for an extension. See 43 CFR 200.35 (1954); Hanna Mining Co., 20 IBLA 149 (1975). Regulatory amendments adopted in 1958 changed these provisions, substituting a 2-year term for the initial permit and allowing an extension for "one additional term of 2 years." See 43 CFR 200.35 (1959).

This language continued, after 1964 as 43 CFR 3221.3(a) (1964), until the general regulatory recodification in 1970. In June of 1970, the Department recodified and renumbered its existing regulations, noting "[i]t is the Department's intent in this revision to make no substantive changes in the regulations." See 35 FR 9502 (June 13, 1970). Notwithstanding this disclaimer, however, this Board has had occasion to note that substantive changes were made in this recodification. See Garland Coal and Mining Co., 52 IBLA 60, 88 I.D. 24 (1981). Insofar as the instant case is concerned, a new provision was added, stating that "extension will be limited to such period, not to exceed 2 years, as may be determined to be allowable under the circumstances in each particular case." This is, of course, the very provision which we interpreted in ASARCO, Inc., supra.

Because one of the aims of the 1970 recodification was to establish a general package of regulations applicable to all mineral leasing (excepting leasing of oil and gas deposits), this provision would arguably be applicable to coal permits as well, despite the express language of 30 U.S.C. § 201(b) (1970). Premised on this assumption, appellant advances an argument that

this regulation was reviewed by the Federal district courts in Peabody Coal Co. v. Andrus, supra, and Peterson v. Department of the Interior, supra. Appellant argues that the decisions in these cases ordered the Department to grant 2-year extensions to run from the date of approval. Therefore, appellant contends that it has an absolute right to a 2-year extension commencing on the date of approval. I emphatically disagree.

First of all, the analogy is not apposite. The 2-year extension for coal leases was statutorily provided, and I doubt that 43 CFR 3511.3-3 could have been legally applied so as to limit the term of the granted extension. Cf. Garland Coal and Mining Co., supra. In contradistinction, there is no statutory provision, whatsoever, relating to extensions of hardrock prospecting permits under section 402 of the Reorganization Act. All leasing provisions under that Act are the creatures of regulation and the Department could either grant or refuse extensions as it saw fit, under terms and conditions of its choosing.

Second, the Peterson case did not hold that the permittee had a right to the extension. Rather, the question analyzed in Peterson was whether the applicant for a permit extension had "a valid existing right" such as would survive the repeal of the statutory provision authorizing extensions of permits; in other words, the court examined whether the applicant had a right to have his application for an extension adjudicated. While the court held that such a right did exist, it expressly refused to order the Secretary to grant the extensions but rather ordered him to exercise his discretion to decide whether or not to grant the extensions "in the same manner as they would have been" adjudicated prior to the enactment of FCLAA. 510 F. Supp. at 784. The court expressly held that the grant of an extension was discretionary. Id. at 783.

The fact that both the Peabody court and the Peterson court directed that any such extension commence from the date of the grant of the extension is scarcely remarkable. In both cases, granting an extension which would run 2 years from the expiration date of the base permit would have been the ultimate exercise in futility, since even the extended term would have expired well before the initiation of judicial review. The fact that the courts, in order to protect the efficacy of their judgments, directed that any granted extension of the coal prospecting permits involved therein should commence at the date of the grant can hardly be metamorphosed into a declaration that all extensions of all types of permits commence running upon approval. 4/

In my view, the approach of the Peabody and Peterson courts is consistent not only with the Board's approach in Leroy S. Pederson, supra, but with our instant decision. The question of when the running of the extended term

4/ Appellant has also suggested that the actions of the Eastern States Office were inconsistent with an opinion written by the Assistant Solicitor -- Minerals, dated Oct. 25, 1973, and a subsequent Instruction Memorandum No. 73-504, directing State offices to follow the opinion. That opinion, however, relates strictly to coal leasing and, for reasons stated earlier, I do not believe it is particularly relevant in matters concerning hardrock leasing under section 402 of Reorganization Plan No. 3.

should be suspended involves the weighing of relative culpability. It is a type of determination which this Board has often been required to make. See, e.g., Richard L. Rosenthal, 45 IBLA 146 (1980).

Appellant suggests that it was misled by prior actions of the Eastern States Office into adopting the course of action which it followed, namely waiting until the last month of the permit to file extension requests. The facts, however, do not support this argument.

Appellant is, of course, purporting to rely on the actions of the Eastern States Office in extending two permits, ES-16074 and ES-16173, for 2 full years from the date of approval. This action, however, did not occur until December 10, 1981. All of the permits involved herein, with the exception of ES-17946, were due to expire before December 1981. In every case, the extension request was not filed until the final month of the permit. For three of these permits (ES-16043, ES-17837, ES-17839), the extension request was not received until the 18th of the month. All of these requests were filed before ASARCO had any reason to believe that its extensions would date from the time of issuance.

While it is true that the application to extend permit ES-17946 was filed after December 10, 1981, the date of filing of the request was consistent with ASARCO's course of conduct prior to December 10. There is simply no evidence of any detrimental reliance on the part of ASARCO. It chose to wait until the last month to apply for extensions and part of the delay in approval is clearly attributable to it.

In any event, the actions of the Eastern States Office in granting 2 full years' extension in ES-16074 and ES-16173 do not rise to the level of past practice on which ASARCO had a right to rely. ASARCO has presented nothing to this Board which would indicate that BLM's handling of these two permits was anything other than an isolated aberration. As such, even if reliance could be shown, it is an insufficient basis upon which to premise the invocation of estoppel against the Government.

Where an application is filed only 3 days in advance of the expiration date of a permit and is approved within 3-1/2 months, I do not think a permittee has shown grounds for equitable relief. When, on the other hand, BLM takes upwards of 18 months to process an extension both justice and equity require that the period of time between expiration of the initial term and the actual grant of the extension be treated as suspended. Therefore, I concur in the instant decision, as well as in the denial of the petition for reconsideration of ASARCO, Inc., supra, issued this same date.

James L. Burski
Administrative Judge.